

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
CHARLES T. CRAWFORD)	File No. A060756
Licensee of Conventional Business Station)	
WPRL470, Santa Inez, California)	
)	
DENNIS ENYEART)	File No. A059522
Licensee of Conventional Business Station)	
WPRL897, Santa Inez, California)	
)	
RADIOWAVE COMMUNICATIONS)	File No. A060866
Licensee of Conventional Business Station)	
WPLV944, Santa Inez, California)	
)	
WILLIAM SORRENTINO)	File No. A060755
Licensee of Conventional Business Station)	
WPRL252, Santa Inez, California)	
)	
US MOBILE WIRELESS)	File No. A060916
Licensee of Conventional Business Station)	
WPRL260, Santa Inez, California)	

ORDER

Adopted: January 25, 2002

Released: January 31, 2002

By the Commission:

I. INTRODUCTION

1. On May 4, 2001, James A. Kay, Jr., (Kay) filed a consolidated Application for Review¹ of a decision by the Licensing and Technical Analysis Branch (Branch), of the Public Safety and Private Wireless Division (Division) dismissing, as untimely,² Kay's consolidated petition for reconsideration of the above-captioned applications for Conventional Business Stations WPRL470, WPRL897, WPLV944, WPRL252, and WPRL260, Santa Inez, California.³ Kay's Application for Review also arguably seeks review of the Division's action denying his separately filed petition for reconsideration of the grant of the application for Station WPRL897.⁴ For the reasons stated below, we dismiss Kay's Application for Review for failure to comply with the Commission's procedural requirements.

¹ Application for Review (filed May 4, 2001) (Kay AFR).

² Letter from Mary Shultz, Chief, Licensing and Technical Analysis Branch (Branch), Public Safety and Private Wireless Division to Robert J. Keller, Esq., on behalf of James A. Kay, Jr. (dated April 4, 2001) (*Branch Letter*).

³ Petition for Reconsideration (filed Dec. 14, 2000) (Second Petition).

⁴ Dennis Enyeart, *Order*, 16 FCC Rcd 5441 (WTB PSPWD 2001) (*Division Order*); Petition for Reconsideration (filed Dec. 13, 2000) (Petition).

II. BACKGROUND

2. Kay is authorized to operate Trunked Specialized Mobile Radio (SMR)⁵ Station WNJA910 in the Oat Mountain, California area on frequencies 855.0625 MHz, 855.2625 MHz, 855.2875 MHz, 855.8125 MHz, and 859.7875 MHz.⁶

3. On November 7, 2000, Radiowave Communications was authorized to operate Station WPLV944 on frequency 855.0625 MHz.⁷ On November 7, 2000, William Sorrentino was authorized to operate Station WPRL252 on frequency 855.2875 MHz.⁸ On November 7, 2000, US Mobile Wireless was authorized to operate Station WPRL260 on frequency 859.7875 MHz.⁹ On November 8, 2000, Charles T. Crawford was authorized to operate Station WPRL470 on frequency 855.2625 MHz.¹⁰ On November 13, 2000, Dennis Enyeart was authorized to operate Station WPRL897 on frequency 855.8125 MHz.¹¹ With the exception of secondary sites licensed to Enyeart and Radiowave, each of these stations were licensed at locations more than 70 miles from Kay's Trunked SMR Station WNJA910.

4. On December 13, 2000, Kay filed a Petition for Reconsideration (First Petition) of the Branch's November 13, 2000 action authorizing Enyeart to operate on frequency 855.8125 MHz at a secondary site in Santa Barbara Storage, CA, under Station WPRL897. Kay alleged that the secondary site did not afford Kay's Oat Mountain primary site the requisite seventy-mile co-channel protection.¹² Kay argued that the Santa Barbara facility, which was located 63 miles from Kay's Oat Mountain site, should not have been coordinated and the application should not have been granted.¹³ Therefore, Kay requested set aside of the license grant and dismissal of the underlying application.¹⁴

5. On December 14, 2000, Kay filed a consolidated "Request for Dismissal or Denial of Application" (Second Petition) against the five above-captioned applications.¹⁵ Kay requested that the applications be dismissed or denied if they had been filed and were pending, because the proposed operations would not afford Kay's operations at Station WNJA910 the requisite seventy-mile co-channel protection.¹⁶ In the event the applications had been granted, Kay requested reconsideration of any such

⁵ For the Part 90 definition of trunked radio system and SMR see 47 C.F.R. § 90.7.

⁶ Second Petition at 1.

⁷ See FCC File No. A060866 (filed Sept. 22, 2000). Radiowave is presently authorized to operate frequency 855.0625 MHz at two primary sites, Santa Inez, CA, and the Santa Barbara Municipal Airport, CA, and one secondary site in South Mountain, CA, which are located approximately 81, 72, and 26 miles, respectively, from Kay's Oat Mountain site. Secondary operations refer to operations that may not cause interference to operations authorized on a primary basis and are not protected from interference from those primary operations. See 47 C.F.R. § 90.7.

⁸ See FCC File No. A060755 (filed Sept. 19, 2000).

⁹ See FCC File No. A060916 (filed Sept. 26, 2000).

¹⁰ See FCC File No. A060756 (filed Sept. 19, 2000).

¹¹ See FCC File No. A059522 (filed Aug. 24, 2000).

¹² Petition at 1 *citing* 47 C.F.R. § 90.621. We note that Station WPRL897 is no longer authorized to operate on frequency 855.8125 MHz at the Santa Barbara Storage, CA, secondary site. See FCC File No. 0000406485, (granted Mar. 21, 2001).

¹³ Petition at 1.

¹⁴ *Id.*

¹⁵ Second Petition at 1.

¹⁶ *Id.*

grant pursuant to Section 405 of the Communications Act of 1934, as amended.¹⁷

6. On January 11, 2001, Crawford, Enyeart, Radiowave, Sorrentino, and US Mobile (Respondents) filed a consolidated "Response" and argued that Kay's Second Petition was filed beyond the statutory thirty-day reconsideration period prescribed by Section 405 of the Act.¹⁸ Respondents also argued that Kay had no basis to challenge the grant of certain facilities licensed to Respondents since those sites were more than 70 miles from Kay's Oat Mountain site.¹⁹ Additionally Respondents argued that Enyeart's Santa Barbara Storage, CA, facility was licensed on a secondary basis and therefore Kay had no cause to object to its use.²⁰

7. On March 13, 2001, the Division denied Kay's First Petition.²¹ The Division noted that Enyeart's secondary site was authorized to operate on only a non-interference basis.²² The Division held that secondary sites may be required to terminate operations should a co-channel licensee locate a primary station within seventy miles of the secondary site, and interference occurs as a result.²³ Kay did not allege or present any objective evidence of interference.²⁴

8. On April 4, 2001, the Branch dismissed Kay's Second Petition as untimely filed.²⁵ Additionally, the Branch observed that the Division had previously addressed Kay's concerns relative to Station WPRL897.²⁶ On May 4, 2001, Kay filed an Application for Review of the Branch's decision.²⁷ On June 5, 2001, Respondents filed an Opposition to Application for Review.²⁸

III. DISCUSSION

9. In his Application for Review, Kay argues he was not afforded adequate notice of the five license grants.²⁹ In this connection Kay argues the Universal Licensing System (ULS)³⁰ online database

¹⁷ *Id.* at n.1 citing 47 U.S.C. § 405(a).

¹⁸ Response to Request for Dismissal or Denial of Applications at 2 (filed Jan. 11, 2001) (Response).

¹⁹ *Id.*

²⁰ *Id.* Respondents also argued that at the time Kay filed his Second Petition, Station WNJA910 was not authorized to operate on frequency 855.0625 MHz and therefore Kay had no basis to object to Radiowave's use of such frequency. *Id.* We disagree. Station WNJA910 was authorized to operate on frequency 855.0625 MHz at the time Kay filed his Second Petition. *See* Connex Freight, *Order on Reconsideration*, 15 FCC Rcd 13345 (WTB PS&PWD 2000).

²¹ *Division Order*.

²² *Id.* at ¶ 4.

²³ *Id.*

²⁴ *Id.*

²⁵ *Branch Letter*.

²⁶ *Id.* citing *Division Order*.

²⁷ Kay AFR at 1-2.

²⁸ Opposition to Application for Review (filed Jun. 15, 2001) (Opposition). In this connection we note that pursuant to 47 C.F.R. § 1.46(c), Respondents requested an extension of time to file responsive pleadings to Kay's AFR. *See* Motion for Extension of Time (filed May 22, 2000) (Motion). According to the Motion, Kay does not object. *Id.* By this *Order* we grant Respondents' request, as it would facilitate a complete record.

²⁹ Kay AFR at 3.

³⁰ In September 1998, the Commission adopted rule changes designed to implement the ULS, the integrated database and automated processing system developed to facilitate electronic filing of wireless applications, licensing information, and public access to such information for all wireless radio services. *See* Biennial Regulatory Review -

maintained by the Commission made it difficult for Kay to “track” and promptly respond to Respondents’ applications.³¹ Additionally Kay argues his Second Petition was timely filed relative to Station WPRL897³² and therefore, Kay argues, the Bureau erred in dismissing his Second Petition, irrespective of whether it was untimely vis-à-vis the other four Respondents.³³ Alternatively, Kay argues that even if the 30-day period did apply, the Bureau and Commission are equitably estopped from applying the thirty-day rule against Kay, because Bureau staff allegedly acted in bad faith in applying the rule with respect to Kay pleadings.³⁴ Kay argues that this alleged behavior denied Kay his “due process right to equal protection.”³⁵ Kay also requests reconsideration of “any favorable action on the above-captioned applications.”³⁶ In a footnote to that sentence, Kay references the Division’s March 13 *Order*.³⁷ Respondents argue that Kay’s Application for Review should be dismissed as procedurally defective because it raises new issues, which the Bureau had no opportunity to consider.³⁸

10. Kay has not previously argued to the Bureau that he was not afforded adequate notice of the grant of the applications or that the Bureau and the Commission are equitably estopped from applying the requirement of Section 405 of the Act that petitions for reconsideration be filed within thirty days from the date of public notice of an action. Section 1.115(c) of the Commission’s Rules provides that “[n]o application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass.”³⁹ The note to Section 1.115(c) states that “new questions of fact or law may be presented to the designated authority in a petition for reconsideration.”⁴⁰ As Respondents correctly point out, none of the arguments raised in Kay’s application for review were previously presented to the Bureau in this proceeding. Kay could have raised these arguments by filing a

- Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, 97, and 101 of the Commission’s Rules to Facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Services, Amendment of the Amateur Service Rules to Authorize Visiting Foreign Amateur Operators to Operate Stations in the United States, WT Docket No. 98-20, WT Docket No. 96-188, *Report and Order*, 13 FCC Rcd 21027 (1998).

³¹ Kay AFR at 4.

³² *Id.* at 5.

³³ *Id.* citing *Kessler v. FCC*, 326 F.2d 673 (1963), for the proposition that the Bureau’s dismissal of his petition under the aforementioned circumstances violated his statutory right to reconsideration under Section 405 of the Act. That case concerns the imposition of a freeze on the acceptance of broadcast station applications pending the adoption of new rules. *Kessler*, 326 F.2d at 678. *Kessler* does not reference Section 405 and Kay cites no other authority on this point. Moreover, this argument contradicts the plain language of Section 1.106 of the FCC’s Rules, which permits the Bureau to grant or not grant reconsideration in “whole or in part” and to dismiss as repetitious petitions for reconsideration, which have been denied previously. See 47 C.F.R. §§ 1.106(j), 1.106(k)(3).

³⁴ Kay AFR at 3, 5-6. Kay sought to incorporate, by reference, his January 27, 2000, Application for Review, filed in a separate and unrelated proceeding, to support his allegation that Bureau staff has acted in bad faith. *Id.* That application for review was dismissed in *City of Commerce, Order on Reconsideration*, 16 FCC Rcd 14461 (WTB, PS&PWD 2001).

³⁵ Kay AFR at 6.

³⁶ *Id.* at 2.

³⁷ *Id.* at 2 n.1.

³⁸ Opposition at 3, citing 47 C.F.R. § 1.115(c). Respondents also argued that Kay’s Second Petition was not filed with the Office of the Secretary, FCC, and that Kay’s underlying interference complaint was not accompanied by a sworn affidavit. Opposition at n.2. We note that Kay’s Second Petition bears the FCC Secretary’s stamp dated December 14, 2000, and Kay alleged that the subject license grants violated the distance requirement set forth in Section 90.621(b) of the Commission’s Rules, 47 C.F.R. § 90.621(b).

³⁹ 47 C.F.R. § 1.115(c).

⁴⁰ *Id.* at note citing 47 C.F.R. § 1.106.

reconsideration petition of the Branch decision but opted to file an application for review instead.⁴¹ Kay offers no explanation for failing to properly raise these issues, and he does not seek a waiver of Section 1.115(c). As Kay did not raise these arguments previously, consideration of these arguments at this juncture in connection with his Application for Review is precluded by Section 1.115(c) of the Commission's Rules.

11. Kay's Application for Review is untimely with respect to the *Division Order*. Kay requests reconsideration "of any favorable action on the above-captioned applications," if the Commission does not grant his application for review. Apart from the Branch Letter, Kay does not specify which "action" he is referring to, other than to reference the Division's *Order* in a footnote.⁴² Applications for Review must be filed within thirty days of public notice, which means the release date for non-rulemaking documents.⁴³ The *Division Order* was released on March 13, 2001, but Kay did not file the Application for Review until May 4, 2001, which was twenty-two days late. Kay neither requested a waiver of the filing time limits nor explained why his request was late-filed.⁴⁴ Accordingly, to the extent Kay seeks review of the *Division Order*, we will dismiss his Application for Review.

IV. CONCLUSION AND ORDERING CLAUSES

12. Kay's Application for Review makes arguments that were not previously presented to the Bureau and is untimely with respect to the *Division Order*. For the reasons stated above, we therefore dismiss Kay's Application for Review.

V. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(c), and Section 1.115 of the Commission's rules, 47 C.F.R. § 1.115, the consolidated Application for Review filed by James A. Kay, Jr. on May 4, 2001, IS DISMISSED.

⁴¹ 47 C.F.R. § 1.104(b).

⁴² Kay AFR at 2 n.1. In the event that Kay also intended to seek reconsideration of the Branch Letter, we note that Section 1.104(b) of the Commission's Rules requires persons seeking consideration of a final action taken pursuant to delegated authority to file either a petition for reconsideration or an application for review (but not both) within 30 days from the date of public notice. 47 C.F.R. § 1.104(b).

⁴³ 47 C.F.R. § 1.4(b)(2).

⁴⁴ Section 1.115(d) of the Commission's Rules requires that Applications for Review and supplements thereto be filed within 30 days from the date of public notice. 47 C.F.R. § 1.115(d). Time limitations on the filing of Applications for Review are established solely by Commission rule. See *Crystal Broadcasters, et al., Memorandum Opinion and Order*, 11 FCC Rcd 4680 (1996) (*Crystal*). The Commission may waive the filing deadline, however, if a party requests a waiver and shows good cause for a waiver. See, e.g. *MTD, Inc., Memorandum Opinion and Order*, 6 FCC Rcd 34 (1991) (late-filed application for review accepted where no party would be prejudiced by consideration of the pleading); *Gilmore Broadcasting Corporation, Memorandum Opinion and Order*, 5 FCC Rcd 5530 n.1 (1990) (untimely supplements to applications for review accepted because party could not have raised the issues in its original application for review). Because Kay has neither explained his failure to file a timely application for review nor requested a waiver of the filing deadline, no waiver is warranted in this case. See *Crystal*, 11 FCC Rcd at 4681 ¶ 9.

14. IT IS ALSO ORDERED that, pursuant to Section 1.46 of the Commission's Rules, 47 C.F.R. § 1.46, that the Motion for Extension of Time jointly filed by Charles T. Crawford, Dennis Enyeart, Radiowave Communications, William Sorrentino, and US Mobile Wireless, on May 22, 2001, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary